

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY W. KING

Claimant

VS.

MANPOWER TEMPORARY SERVICES

Respondent

AND

ASSOCIATED INDEMNITY CORP.

Insurance Carrier

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Docket No. 270,185

ORDER

Claimant appeals the January 17, 2002 and February 1, 2002 Orders of Administrative Law Judge Bryce D. Benedict wherein claimant was denied a request for production of documents after the Administrative Law Judge found that the workers' compensation statutes do not provide for requests for production, but respondent's request for an order for inspection and reproduction of records was granted.

ISSUES

Claimant raises the following issues for review:

- "(1) All issues found adversely to claimant.
- "(2) Authority to compel production of documents per K.S.A. 44-551(b)(1).
- "(3) What is the scope of the 'production' authority of an Administrative Law Judge?
- "(4) May an Administrative Law Judge direct and order persons not party to the claim to take particular actions, including divulging

records concerning a claimant despite federal confidentiality statutes?

- "(5) Does an Administrative Law Judge have the power to 'order' the Social Security Administration to divulge all papers/records within its control concerning a claimant?
- "(6) Did the Administrative Law Judge abuse his discretion by denying records to claimant and contemporaneously ordering the same records be provided to respondent?"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board (Board) finds that the January 17, 2002 Order of the Administrative Law Judge should be reversed and remanded with regard to claimant's requested order for production, and the February 1, 2002 Order For Inspection & Reproduction Of Medical Records And Related Information should be remanded to the Administrative Law Judge for proceedings consistent with this decision.

Respondent filed a request with the Administrative Law Judge for an order for inspection and reproduction of medical records and related information. After certain changes to the Order, the Administrative Law Judge granted respondent's request. Claimant objects to the Order, arguing that the Administrative Law Judge does not have the power to direct and order persons not parties to the claim to divulge records concerning claimant, violating what claimant identifies as "federal confidentiality statutes." Claimant argues that the Administrative Law Judge does not have the power to order the Social Security Administration to divulge all papers and records within its control concerning a claimant.

Claimant also argues that the Administrative Law Judge abused his discretion by denying an order for production to claimant while at the same time granting an order for production to respondent. The Administrative Law Judge, in denying claimant's request for production, found that the Workers Compensation Act does not provide for requests for production and further reasoned that such matters were best resolved by counsel exercising professional courtesy and cooperation and, if necessary, claimant could take a deposition.

The Order granted to respondent was addressed to hospitals, clinics, pharmacies, etc., including both the Social Security Administration and the Kansas Department of Human Resources. The Order directed the production of records, papers, documents,

etc., related to claimant and related to this action, and was limited to employers for whom claimant had worked since July 8, 1986, a period of 15 years preceding the accident.

Claimant's request, which was denied by the Administrative Law Judge, involved claimant's Motion To Produce, which was directed to respondent, and included items such as fringe benefits, wage statements, bonuses, medical records, personnel records, job descriptions, videotapes, photos and numerous other documents related to claimant's employment with respondent and claimant's work-related injury.

The Board must first consider whether the appeal from the Orders of the Administrative Law Judge is within the Board's jurisdiction pursuant to K.S.A. 2001 Supp. 44-551.

K.S.A. 2001 Supp. 44-551 grants the Board jurisdiction to review:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

The Board considered a similar issue in its decision in Rhodeman v. Moore Management, WCAB Docket No. 234,890 (Oct. 1999). In Rhodeman, the Board found that, based upon Skahan v. Powell, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982), the three criteria for making an order final are satisfied when a request for production is disputed in workers' compensation litigation. The appeal of the order for production itself is the only effective option available to the parties. The decision of the Administrative Law Judge should, therefore, be considered final and subject to review. The Board will take jurisdiction of the issues raised by claimant.

The Board will next consider whether the Administrative Law Judge was correct in deciding that the workers' compensation statutes do not provide for requests for production.

K.S.A. 2001 Supp. 44-551(b)(1) grants the Administrative Law Judge the power:

. . . to administer oaths, certify official acts, take depositions, issue subpoenas, **compel** the attendance of witnesses and the **production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state**, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. (Emphasis added.)

K.S.A. 44-549(b) states:

The director and the board, for the purposes of the workers compensation act, shall have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents, and records to the same extent as is conferred on district courts of this state under the code of civil procedure.

K.S.A. 2001 Supp. 44-551 grants the Administrative Law Judge the power to order the production of items necessary for the conclusion of litigation and as they may relate to claimant's employment as well as injuries suffered with respondent. K.S.A. 44-549 not only grants both the Director and the Board those same powers, but also references the code of civil procedure. The Board held, in Newton v. Grede Foundries, Inc., WCAB Docket No. 265,221 (Feb. 2002), that, as the Workers Compensation Act contains no specific discovery provisions, the Board, in following K.S.A. 44-549, will look to Chapter 60 for guidance.

The Board, therefore, finds that the Administrative Law Judge's finding that the workers' compensation statutes do not provide for requests for production is in error and should be reversed.

The Board acknowledges that K.S.A. 2001 Supp. 60-226 outlines the scope of discovery which may be allowed in civil litigation. K.S.A. 2001 Supp. 60-226(c)(4) allows for protective orders where necessary stating:

[T]hat certain matters not be inquired into, or that the scope of discovery be limited to certain matters. . . .

Chapter 60 contemplates that certain controls be placed on discovery. Those controls are intended to protect the rights and any privacy concerns of the parties to the litigation.

K.S.A. 2001 Supp. 44-551(b)(1) states:

On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or **to remand any matter to the administrative law judge for further proceedings.** (Emphasis added.)

The Board finds the order by the Administrative Law Judge denying claimant's request for production violates K.S.A. 2001 Supp. 60-226 and K.S.A. 2001 Supp. 44-551.

The Board, therefore, remands this matter back to the Administrative Law Judge for proceedings consistent with this decision.

The Order of the Administrative Law Judge granting respondent's request for an order for inspection and reproduction of medical records is also remanded. The Board finds the Order of the Administrative Law Judge to be overly broad.

The Privacy and Disclosure of Official Records and Information Act, 20 CFR, Part 401, limits the disclosure of personal information in both program and nonprogram record situations without the consent of the subject of the record. The Social Security Administration applies different levels of confidentiality to disclosures of information, depending upon whether the information comes from nonprogram records, i.e., administrative and personnel records, versus program records, which contain information about a client's involvement in Social Security Administration programs. For the nonprogram administrative and personnel records information, the Privacy Act is applied. For program records, a somewhat more strict confidentiality standard than that contained in the Privacy Act is applied, as the information obtained for program purposes is often very sensitive and is required to be provided in order for the client to qualify for the particular programs. These disclosure determinations can only be made on a case-by-case basis.

Additionally, the Social Security Administration is limited by outside agencies, such as the Internal Revenue Service which prohibits the disclosure of individual earning records. The Social Security Administration also strictly limits what information can be provided involving drug and alcohol abuse, which are used to determine client eligibility in Social Security benefit programs. The Board, therefore, finds that the Order of the Administrative Law Judge, as it specifically relates to the Social Security Administration, is overly broad. See *also* 20 CFR, Part 401.105 and 401.125.

This matter is, therefore, remanded to the Administrative Law Judge for reconsideration of the Order of February 1, 2002, and to limit the documents that must be provided, in particular from the Social Security Administration. See Rhodeman, *supra*.

The Board does not retain jurisdiction of this matter and, following any additional decisions by the Administrative Law Judge, any aggrieved party must follow the appropriate measures in order to obtain additional review by the Board over these disputes.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated January 17, 2002, should be and is reversed and remanded, and the Order dated February 1, 2002, should be, and is

hereby, remanded, both consistent with the above Order, pursuant to K.S.A. 2001 Supp. 44-551.

IT IS SO ORDERED.

Dated this ____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I believe this claim should be remanded for the Administrative Law Judge to reconsider the February 1, 2002 Order and to limit the documents that must be produced. That Order is overly broad and should be modified. See Rhodeman, *supra*.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Mark A. Buck, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation